Supreme Court, U.S.
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No. 07-_____

IN THE

Supreme Court of the United States

ED BUSS, in his official capacity as Superintendent of the Indiana State Prison,
Petitioner,

v.

CHRISTOPHER M. STEVENS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a state court unreasonably apply federal law under 28 U.S.C. § 2254(d) when it holds that the Sixth Amendment right to counsel does not require trial counsel to retain successive mental-health experts in search of one that will give counsel's desired favorable opinion?

II. Does a state court unreasonably apply federal law under 28 U.S.C. § 2254(d) when it holds that the Sixth Amendment right to counsel permits attorneys in a death penalty case to exercise reasoned professional judgment to present expert testimony of a psychologist retained by the defense—the only one the state would pay for—that made both favorable and unfavorable findings in an attempt to make the best use of that expert that he can?

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PETITION FOR WRIT OF CERTIORARI

The State of Indiana, through Superintendent of the Indiana State Prison Ed Buss, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit granting Christopher Stevens a writ of habeas corpus from his sentence of death.

OPINIONS BELOW

The opinion of the court of appeals (App. 3a) is reported at *Stevens v. McBride*, 489 F.3d 883 (CA7 2007), *reh'g and reh'g en banc denied*. The order of the district court (App. 50a) is reported at *Stevens v. McBride*, 492 F.Supp.2d 928 (N.D. Ind. 2005). The opinion of the Indiana Supreme Court on appeal from the denial of a petition for post-conviction relief (App. 136a) is reported at *Stevens v. State*, 770 N.E.2d 739 (Ind. 2002), *reh'g denied*, *cert. denied*, 540 U.S. 830 (2003). The opinion of the Indiana Supreme Court on direct appeal (App. 174a) is reported at *Stevens v. State*, 691 N.E.2d 412 (Ind. 1997), *reh'g denied*, *cert. denied*, 525 U.S. 1021 (1998).

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 2007. A petition for rehearing was denied on August 28, 2007. App 1a. The Court of Appeals amended its judgment on September 28, 2007. Justice Stevens extended the time for filing a petition for a writ of certiorari to January 25, 2008

(No. 07A438). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

Christopher Stevens received the death penalty for intentionally murdering a ten-year-old boy during the course of molesting him and while on parole for a prior child molesting conviction. The facts supporting the convictions are supported by Stevens's two confessions—one to his brother and another to police—and overwhelming physical evidence; Stevens does not even dispute his guilt. Fourteen years after this crime, the Seventh Circuit, per a fractured decision authored by Judge Wood, reversed the sentence without any application of the standards governing habeas review found in 28 U.S.C. § 2254(d). As this Court has been willing to do in similar egregious cases that have flouted the limits on habeas review, it should grant this petition and reverse the judgment of the court of appeals that directed a retrial of the penalty-phase.

1. On the night before Respondent Christopher Stevens was released from prison for his first child molesting conviction, his cellmate, Tracy Eastin, predicted that Stevens would be back in prison within two months for another child molesting offense. Stevens replied, "No, I won't. Next time, I'll kill him." App. 227a.

Upon his release from prison in May 1993, Stevens went to live with his father in a subdivision in Cloverdale, Indiana. Ten year-old Zachary Snider lived in the same neighborhood about a quarter-mile away. During that summer, Stevens befriended, seduced, and repeatedly molested Zachary. On the morning of July 15, 1993, when Zachary threatened to tell his parents what had happened, Stevens murdered the boy and fulfilled his earlier promise to Eastin. In Stevens's words,

> [Zachary] said, he, he threatened to tell ... about me and him, and, ,uh, I'd just w< .t through a bunch of shit in Indy [the earlier conviction and imprisonment for child molesting], and that was just, just on my mind. I was like, I just didn't want to, thinking to myself, you know, I just can't go through all that shit again.

App. 232a. Stevens killed Zachary by first trying to suffocate him with a pillow, and when that didn't work, Stevens strangled Zachary with a cord from a video game controller. After a short time, Zachary started breathing again, so Stevens got a trash bag from the kitchen, wrapped it around Zachary's head, and suffocated him. App. 232a-233a.

Stevens then disposed of Zachary's body and bicycle by throwing them off of a bridge in a remote

location. Later that night, Stevens returned to the scene to retrieve the trash bag off of Zachary's head so that police could not trace the bag back to him. In the meantime, a massive manhunt was underway for the missing boy. App. 234a-235a.

On July 19, 1993, Stevens confessed to his brother Mark that he had murdered Zachary. Stevens told Mark that when Zachary threatened to tell his parents about his encounters with Stevens, he got scared and "clicked." Stevens gave his brother a detailed description of the events and of the location of the bridge where he left Zachary's body and bicycle. App. 230a.

Mark waited until July 21 to tell police about Stevens's admission. When police went to the bridge, they found the bicycle and a decomposing body of a boy. After his arrest, Stevens gave another detailed confession to police detailing his actions. He also wrote a letter to Eastin that read in part,

> You know your prediction was right. You said you thought that I'd be right back in jail two months after I got out. Well, I was back in four days short of two months. I think you might have cursed me. HA! HA! I don't really know what to say. Does it suprise [*sic*] you?

App. 236a.

2. The State of Indiana charged Stevens with murder and requested the death penalty. The trial court appointed two attorneys to represent Stevens that were duly qualified to handle capital cases pursuant to the heightened requirements of Indiana Criminal Procedure Rule 24. Jeffery Baldwin served

as lead counsel and, at the time of his appointment, had represented defendants in three other death penalty cases, none of which received a death sentence. Robert Clutter served as co-counsel to Baldwin. He had previously represented one capital defendant, also avoiding a death sentence. Both attorneys had substantial experience defending criminal felony cases. App. 181a-182a.

Baldwin and Clutter assembled a defense team that included investigator Larry Atwell, paralegal Heidi Marshall, and mitigation specialist Carol Knoy. Knoy was a former police officer with nine years of experience as a sentencing consultant and mitigation specialist, including work on two capital cases. On Knoy's suggestion, Baldwin and Clutter hired at public expense Dr. Lawrence Lennon, a psychiatrist with a background in child and adolescent psychology, and who, according to Knoy, had given impressive testimony in an earlier Indiana death penalty trial involving defendant Steven Holmes. App. 141a-142a, 182a.

Dr. Lennon was a former professor and chairman of the Psychology Department at St. Joseph's College and was the clinical director at the Humana Hospital—Indianapolis Child and Adolescent Psychiatric Center. Other capital defense attorneys also commended to Baldwin and Clutter Dr. Lennon's work in the Holmes case, one in which the defendant received a term of years instead of the death penalty. *See Holmes v. State*, 642 N.E.2d 970 (Ind. 1994). The similarities between Holmes's and Stevens's mitigating evidence relating to abusive childhoods and attendant psychological issues made Dr. Lennon's performance in the Holmes case

particularly important to Baldwin and Clutter. App. 142a, 182a-183a.

Dr. Lennon evaluated Stevens in person on six separate occasions, reviewed Stevens's confession, interviewed Stevens's family, and reviewed a "suitcase full of data" about Stevens that included school records, mental health records, and arrest records. App. 183a. Dr. Lennon conducted several psychological tests on Stevens. Trial R. at 5309-5311, 5358-61; PCR R. at 1880, 2034. Dr. Lennon was assisted in his assessment of Stevens by a social worker and a second psychologist. App. 183a. Although Baldwin and Clutter specifically instructed Dr. Lennon not to write a report detailing his findings until after he first discussed his opinions with them, Dr. Lennon ignored counsel's wishes and wrote a report anyway. He completed his report on July 18, 1994. App. 200a; Trial R. 5358-61.

Baldwin and Clutter were dissatisfied with Dr. Lennon as a potential witness because he had not diagnosed Stevens with mental illnesses that provided a defense or significant mitigating evidence. But the trial court had ordered that counsel complete the discovery of all expert reports by July 19, 1994, and submit their final witness lists by July 29, 1994, so that the State could adequately prepare for the trial scheduled for September 12, 1994. Trial R. 9, 11. Counsel accordingly disclosed Dr. Lennon's report on July 22, 1994, and listed for the first time Dr. Lennon as an actual witness on July 29, 1994. App. 144a n.4; Trial R. 508, 513.

Because Dr. Lennon's opinion did not support an insanity defense at the guilt-phase, counsel decided

to pursue a voluntary manslaughter defense under the theory that Stevens killed Zachary in "sudden heat." The jury nonetheless found Stevens guilty of murder.

At the penalty-phase, counsel presented evidence proving the following mitigating circumstances:

> One, Christopher Stevens was 20 years of age at the time of this offense; two, Christopher Stevens was raised in a poor, dysfunctional, nonnurturing environment; three, Christopher was physically, verbally, and emotionally abused and neglected as a child; four, Christopher Stevens was sexually abused as a child and was not believed or protected from such abuse; five, Christopher Stevens has performed poorly in school; six, Christopher Stevens was moved frequently and, therefore, was kept from establishing meaningful relationships with friends and family as a child; seven, Christopher Stevens has been diagnosed with severe depression and a passive dependent personality disorder; eight, Christopher Stevens as a child observed the sexual abuse of his step-sister; nine, Christopher Stevens was abandoned by his mother as a child; ten, Christopher Stevens has frequently considered and attempted suicide; eleven, Chris Stevens has abused alcohol and drugs as a child and as an adolescent; twelve, Christopher Stevens has confessed to the crime of murder of Zachary Snider; thirteen, Christopher Stevens has low average intelligence; fourteen, Christopher Stevens' mother was incarcerated for a period of his formative years; fifteen, Christopher Stevens' father was incarcerated for a period of his formative years; sixteen,

> Christopher Stevens was cooperative with and did not resist the arresting officers; seventeen, Christopher Stevens had inappropriate role models during his formative years; eighteen, Christopher Stevens suffers from low self-esteem, and this was created and reinforced by his family and peers.

App. 276a-277a n.28. This evidence included testimony from family, friends, a drug and alcohol counselor, child welfare officials, and documentation from schools, a mental health facility, and welfare agencies.

Additionally, Dr. Lennon testified at the penalty-phase. He explained that Stevens suffered characteristics of reactive attachment disorder (although Stevens did not satisfy all of the diagnostic criteria for a diagnosis), and demonstrated antisocial and sociopathic tendencies (although he could not make a diagnosis of antisocial personality disorder or sociopathic personality disorder). He also testified about Stevens's suffering sexual abuse as a child and prior alcohol and drug use, but acknowledged Stevens's statement to him that he stopped abusing substances when he was first arrested for the child molesting offense for which he was imprisoned before meeting Zachary. Dr. Lennon further explained that "so much of [his] behavior could be explained by the abuse, the neglect that he's had on top of his genetic predisposition, and that ... his birth mother ... probably did do drugs or alcohol during pregnancy." App. 156a, 210a.

The jury recommended that the trial court impose the death penalty. The trial court later

independently sentenced Stevens to death.[1] App. 185a. On direct appeal, the Indiana Supreme Court affirmed both Stevens's conviction and death sentence. App. 226a. As to the sentence, the Indiana Supreme Court independently determined that Stevens should be sentenced to death, finding,

> The molestation and intentional murder of a ten-year-old child by one on probation, especially probation for a previous child molesting conviction, exemplifies a crime and criminal particularly worthy of the severest of penalties. While his confession and troubled childhood were mitigating circumstances properly found present, we agree with the trial court's determination that these weighed far less than the aggravating circumstances.

App. 279a. The Court denied certiorari. *Stevens v. Indiana*, 525 U.S. 1021 (1998).

3. Thereafter, Stevens filed a petition for post-conviction relief in the trial court. Among the various issues asserted, Stevens claimed that he received ineffective assistance of counsel at the guilt- and penalty-phases due to Baldwin and Clutter's handling of Dr. Lennon and mental health evidence.

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[1] Under Indiana law at the time of Stevens's trial, the trial judge had the sole responsibility for deciding whether a defendant should be sentenced to death, life without parole, or a specific term of years. The jury offered its advice through a recommendation to the trial judge as to its opinion about an appropriate sentence. Indiana Code §35-50-2-9(e) (1995). *See also Schiro v. Farley*, 510 U.S. 222, 226 (1994) (explaining how Indiana's capital advisory jury/judge sentencing scheme operates); *Judy v. State*, 275 Ind. 145, 166, 416 N.E.2d 95, 107 (1981) (same).

At an evidentiary hearing, Stevens presented testimony by psychiatrist Dr. Philip Coons and psychologist Dr. Robert Kaplan, frequent expert witnesses for defendants in Indiana criminal proceedings. Dr. Coons opined that Stevens may have suffered from a dissociative disorder—a condition formerly known as multiple personality disorder—where Stevens switched personalities with Zachary for a moment, leading Stevens to believe that Zachary wanted to be killed because of the molestation. App. 16a. Dr. Coons acknowledged, however, that diagnoses of dissociative disorders are controversial in the psychiatric field and that some prominent psychiatrists have written publications expressing skepticism as to their validity. PCR R. 1895-96. Dr. Coons also found, just as Dr. Lennon did, that Stevens showed characteristics of other personality disorders, such as antisocial personality disorder, although he did not meet the criteria for a diagnosis. He also observed Stevens's past substance abuse. PCR. R. 1884-86. Dr. Kaplan agreed with and largely reiterated Dr. Coons's opinion. App. 16a.

The post-conviction court entered detailed findings of fact and conclusions of law wherein it denied Stevens's petition. App. 174a. As it relates to the penalty-phase ineffectiveness claim, the post-conviction court found that trial counsel did not render deficient representation in retaining, investigating, and then ultimately using Dr. Lennon as a mental health expert witness because Dr. Lennon was a qualified psychologist that came highly recommended by counsel's own mitigation specialist and other members of the capital defense bar and because no other experts would have been

appointed just because counsel were unhappy with the results of Dr. Lennon's evaluation of Stevens. App. 189a-191a. The post-conviction court also found that Stevens was not prejudiced by the use of Dr. Lennon in large part because all of the other evidence of the crime and extensive cover-up refutes any theory that Stevens was mentally ill, let alone insane, at the time of the crime. Additionally, the state court noted that Drs. Coons and Kaplan testified about how Stevens forcibly raped and molested Zachary while all of the evidence presented at trial was that Zachary was a willing participant in the encounters. In the post-conviction court's view, this change in the nature of their relationship cast Stevens in a new, even more vicious character not otherwise portrayed to the jury or the trial court. "The jury would not consider such a violent, voracious predator as someone deserving a penalty less than death." App. 193a.

On appeal, the Indiana Supreme Court affirmed and, utilizing its standard of review for such cases, found in detail the post-conviction court's factual findings and legal conclusions to be supported by the record. App. 136a. The Court denied certiorari. *Stevens v. Indiana*, 540 U.S. 830 (2003).

4. Next, Stevens filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana. Stevens repeated his claim, among others not at issue here, that Baldwin and Clutter rendered ineffective assistance at the guilt- and penalty-phases of trial in the way they handled Dr. Lennon and mental heath evidence. The district court denied relief after determining that the state court adjudications were

not contrary to or an unreasonable application of federal law. App. 50a-135a.

The Seventh Circuit, per a fractured decision by Judge Wood, reversed in part and directed that a new penalty-phase trial be conducted due to ineffective assistance of counsel. First, Judge Wood, joined in result by Judge Manion, affirmed the denial of relief as to the guilt-phase. In so doing, the panel majority cited and applied the proper standard of 28 U.S.C. § 2254(d). App 17. Judge Ripple dissented from that portion of the opinion and expressed his view that counsel were ineffective at the guilt-phase because they should have found expert witnesses to support an insanity defense instead of a pursuing manslaughter defense. App. 29a-37a.

Second, Judge Wood, joined by Judge Ripple, found, independently and without analysis under section 2254(d), that trial counsel rendered ineffective assistance at the penalty-phase. This was for two reasons: 1) counsel did not investigate Dr. Lennon's professional opinion further even though they were dissatisfied with it and his services, and 2) counsel should not have denominated Lennon as their expert witness until after learning his opinions so that they would not have to disclose Dr. Lennon's damaging report in discovery. The panel majority found this performance to be prejudicial because the later-developed mental health opinions of Drs. Coons and Kaplan would have been relevant as mitigating evidence and Dr. Lennon gave damaging testimony on cross-examination by the prosecution, a fact that the court imputed to counsel. App. 19a-26a. The panel majority concluded its discussion of this claim

with only a conclusory reference to section 2254(d)'s "unreasonable application" requirement:

> We conclude that the conduct of Stevens's lawyers at his capital sentencing proceedings fell below the constitutional minimum standard and that this was prejudicial to Stevens. The Indiana Supreme Court's ruling to the contrary amounted to an unreasonable application of *Strickland*.

App. 26a. Judge Manion dissented and explained his belief that the state courts' adjudications of the penalty-phase counsel claim cannot be considered objectively unreasonable in light of this Court's precedents. App. 37a-49a. The full panel agreed that Stevens's remaining arguments, none of which are relevant to this petition, lacked merit. App. 26a-29a.

The State, through its prison superintendent, sought rehearing and rehearing en banc. Rehearing was denied, although the panel amended its opinion to change the conditions under which the writ should issue per the State's request. App. 1a-2a.

5. This petition ensues. Stevens has also filed a certiorari petition seeking further review of his rejected claims. *Stevens v. Buss*, No. 07-7745.

REASONS FOR GRANTING THE PETITION

I. In this capital case, the Court of Appeals granted habeas relief for penalty-phase ineffective assistance of counsel without regard to 28 U.S.C. § 2254(d).

Since *Williams v. Taylor*, 529 U.S. 362 (2000), the Court has repeatedly admonished lower federal courts that, where state courts have adjudicated the claims at issue in a habeas corpus petition, relief cannot be granted unless those adjudications were *contrary to* or involved an *unreasonable application of* clearly established federal law.[2] This is one of an unfortunate and surprising number of cases, particularly capital cases, where the habeas court has neglected those instructions and has instead reviewed the merits of a penalty-phase ineffective assistance claim essentially *de novo*. The Court should grant this petition and reverse the court of appeals to make it clear that federal courts *must* give state court decisions the deference due to them under 28 U.S.C. § 2254(d), even when a sentence of death is at stake.

1. The decision below references section 2254(d)(1) or its operative "unreasonable application" standard only once when addressing Stevens's penalty-phase inadequate-assistance claim. Even then, it mentioned the proper standard only in its concluding sentence, when after independently finding error, it said that "The

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[2] The parties agreed below that this case involves only the "unreasonable application" clause of section 2254(d) and not the "contrary to" clause because the Indiana courts identified and applied the correct federal law.

Indiana Supreme Court's ruling to the contrary amounted to an unreasonable application of *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]." App. 26a. This is the only attempt at analysis under section 2254(d) in the panel majority's discussion of the penalty-phase claim. Such a summary statement amounts to nothing more than "lipservice to the *Williams* standard." *Rompilla v. Beard*, 545 U.S. 374, 404 (2005) (Kennedy, J., dissenting).

Instead of genuinely applying section 2254(d), the court of appeals reviewed Stevens's claim *independent* of the Indiana Supreme Court's contrary decision and concluded on its own that Stevens's attorneys rendered prejudicially deficient assistance at the penalty phase of trial. App. 24a ("We conclude, on this record, that the performance of Stevens's lawyers at his capital sentencing proceedings fell below the constitutional minimum."), 25a ("In this case, we find a reasonable probability—that is, one sufficient to undermine our confidence in the outcome of the sentencing phase—that the result would have been different if the jury had heard mainstream psychological testimony..."), and 26a ("We conclude that the conduct of Stevens's lawyers at his capital sentencing proceedings fell below the constitutional minimum standard and that this was prejudicial to Stevens.").

That is precisely the analysis prohibited by section 2254(d)(1). *Yarborough v. Alvarado*, 541 U.S. 652, 665-66 (2004) ("We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a de novo matter."). It is well established that a state court decision that is "merely erroneous" cannot justify

habeas relief. *Early v. Packer*, 537 U.S. 3, 11 (2002) (per curiam).

The panel majority's *de novo* analysis of the penalty-phase counsel claim is in striking contrast to the *prior* section of its opinion discussing Stevens's guilt-phase counsel claim. There, the majority carefully explained why the Indiana Supreme Court's decision was *not* objectively unreasonable. App. 17a ("And, of course, we conduct this analysis through the lens of AEDPA's unreasonableness standard, a standard that 'allows the state court's conclusion to stand if it is one of severally equally plausible outcomes'," and "We therefore conclude that the Indiana Supreme Court did not unreasonably apply *Strickland* in determining that Stevens was not prejudiced..."). The court gave no such attention to the requirements of section 2254(d)(2) in its discussion of the penalty-phase claim.

At the very most, the court of appeals reviewed the state courts' decisions for "clear error" and not objective unreasonableness. Although he reached the correct result, even Judge Manion's dissent invoked long-standing Seventh Circuit precedent that "only a clear error in applying *Strickland*'s standard would support a writ of habeas corpus," *citing United States ex rel. Bell v. Pierson*, 267 F.3d 544, 557 (CA7 2001), and, "[w]e therefore review for clear error in the Supreme Court of Indiana's decision." App. 43a-44a. As the Court has made clear, however, "[t]he gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). The Seventh

Circuit has not yet recognized its own error in continuing to review state court decisions for clear error after *Andrade*.

2. The treatment afforded by the decision below is precisely the sort of analysis *prohibited* by section 2254(d), not to mention the Court's many precedents applying and explaining the statute. The court of appeals' insistence that disagreements with its conclusions are unreasonable "gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials." *Yarborough v. Gentry*, 540 U.S. 1, 11 (2003) (per curiam). It is also "inconsistent with the presumption that state courts know and follow the law." *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam). Simply put, the court of appeals here "substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)." *Id.* at 25. The Court should grant the petition and reverse the judgment of the court of appeals.

II. When section 2254(d) is properly applied to this case, there can be no question that the state courts' decisions hold up

Under the proper legal standard, there is no basis for issuing a writ of habeas corpus as to Stevens's sentence.

1. The main complaint of the decision below is that trial counsel failed to investigate adequately mental health evidence beyond utilizing Dr. Lennon's services. The court of appeals concluded, without reference to the prior state court decisions,

that trial counsel was obligated not just to investigate Stevens's mental health and history, but to go even further and deconstruct their own expert's evaluation, presumably with additional experts. Under this reasoning, counsel in capital cases are constitutionally obligated to investigate every expert's professional opinion until either they find a sufficiently helpful opinion or exhaust the font of potential expert witnesses. There is no authority, let alone clearly established authority of this Court, to support the novel assertion that counsel must not rely on the professional opinions of properly licensed and credentialed experts. Rather, the clearly established law is otherwise, that counsel may decide not to continue an investigation if it is reasonable under *all of the circumstances*, an inquiry that requires "a heavy measure of deference to counsel's judgment[ ]." *Strickland*, 466 U.S. at 690-91.

Moreover, as the state courts found, Stevens was not entitled to additional experts at public expense, so no funding for additional "exploratory" experts would have been granted by the trial court. App. 191a. The decision below does not even refute these state-court conclusions, so they can in no way be objectively unreasonable determinations of fact or applications of federal law. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1985); *Granviel v. Lynaugh*, 881 F.2d 185, 192 (CA5 1989); *Harris v. Vasquez*, 949 F.2d 1497, 1516 (CA9 1991); *Pawlyk v. Wood*, 248 F.3d 815, 828 (CA9 2001).

To be sure, once counsel learned of Dr. Lennon's findings, they knew that Dr. Lennon's testimony would not be as helpful as they had initially hoped.

But the various circuits have long understood that such dissatisfaction does not entitle defendants to "shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders." *Poyner v. Murray*, 964 F.2d 1404, 1419 (CA4), *cert. denied*, 506 U.S. 958 (1992). See also *Smith v. Cockrell*, 311 F.3d 661, 676 (CA5 2002) (same), *cert. dismissed by Smith v. Dretke*, 541 U.S. 913 (2004), *abrogated on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004); *Williams v. Cain*, 125 F.3d 269, 278 (CA5 1997) (same), *cert. denied*, 525 U.S. 859 (1998); *Granviel*, 881 F.2d at 192. "Counsel is not required to 'continue looking for experts just because the one he has consulted gave an unfavorable opinion.'" *Walls v. Bowersox*, 151 F.3d 827, 835 (CA8 1998); *Granviel*, 881 F.2d at 192 (same).

Given the widespread agreement among the federal circuits as to the obligations of states and defense counsel when it comes to using expert witnesses in capital cases, Indiana courts did not erroneously, let alone unreasonably, apply federal law. It is the Seventh Circuit that has erred.

The remaining question in this regard is whether counsel were ineffective by choosing to present Dr. Lennon's testimony at all. "Neither option ... so clearly outweighs the other that it was objectively unreasonable for the [state courts] to deem counsel's choice ... a tactical decision about which competent lawyers might disagree." *Bell v.Cone*, 535 U.S. 685, 702 (2002). Although the court of appeals believed Dr. Lennon to be an incompetent witness, counsel and the Indiana courts disagreed in large part due to his credible background and experience. App. 141a-

142a, 189a-190a. Indeed, the state courts did give mitigating weight to many of Dr. Lennon's observations. App. 275a-276a & n.28.

There should be little doubt that Stevens's counsel would have been subject to an even stronger claim of ineffectiveness if, once having received Dr. Lennon's opinions and not having the time or resources to find an alternative, instead decided not to present *any* expert testimony about Stevens's background and mental health. Even if one concludes, as Judge Manion did, that Dr. Lennon was not very good witness on cross-examination (App. 48a), that is known only through the distorting lens of hindsight. *Strickland*, 466 U.S. at 689. Because it is counsel's performance—not Dr. Lennon's—that must be judged, the state courts properly recognized that Dr. Lennon was counsel's only acceptable option that counsel had available to them. The state courts, unlike the court of appeals, "indulge[d] a 'strong presumption' that counsel's conduct [fell] within the wide range of reasonable professional assistance," a necessary presumption "because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Id.* at 702.

2. The other theory on which the court of appeals found counsel deficient was in counsel's *identifying* Dr. Lennon as a testifying expert before they received his report. The record does not support either the factual or legal conclusions in this regard. The trial court ordered counsel to disclose any expert reports no later than July 19, 1994, and confirm the identity of all witnesses by July 29, 1994, or else be

barred from presenting such evidence at trial. Trial R. 9, 11. Dr. Lennon completed his evaluation on July 18, 1994. Trial R. 5358-63. Counsel thereafter disclosed the report to the State six days late[3], on July 25, 1994, Trial R. 508, and listed him as an expert witness on July 29, 1994, the final day counsel had to make that decision. Trial R. 513. Before that time, counsel had only referred to Dr. Lennon only as a *potential* expert witness just as the court of appeals thought they should have done. Trial R. 343. Had counsel not made the required disclosures when they did, then the defense would have had no expert available to call as a witness at trial. There certainly was no time left to launch a new investigation into the adequacy of Dr. Lennon's opinions. Counsel chose to use Dr. Lennon in spite of their reservations about him, and doing so was reasonable. That decision preserved Stevens's rights, not jeopardized them.

Not only was counsel's disclosure necessary to preserve Stevens's right to a full and fair sentencing proceeding, but counsel were also ethically and legally obligated to share Dr. Lennon's report with the prosecution prior to trial. The Indiana Supreme Court explicitly found that once Dr. Lennon prepared a written report and provided it to counsel, counsel's hands were tied by state law and disclosure was required. App. 144a. The decision below rejected this holding and ruled that Indiana state law did not compel disclosure of the report. The Indiana Supreme Court, not the Seventh Circuit, is the final arbiter of the Indiana rules of procedure

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[3] The record does not specifically disclose why counsel were so late in meeting this discovery deadline, but Petitioner assumes that it was because of delivery delays and not intentional delay.

and evidence, and the court of appeals was inexorably bound to honor its judgment. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

3. Finally, the decision below ignored the state courts' prejudice analysis and failed to accord it the appropriate deference. The state courts explained that Stevens suffered no prejudice from any of counsel's potential errors in developing and presenting mental health evidence because the objective facts of the crime and Stevens's own confession "strongly contradict[ ]" the notion that he was insane or impaired at the time of the crime. App. 154a-155a.

Stevens first tried to suffocate Zachary with a pillow. When that was unsuccessful, he strangled the boy with a cord from a video game controller. Then, once Zachary started breathing again after several minutes, Stevens retrieved a plastic garbage bag from his kitchen and suffocated Zachary by tying it around his head. Stevens then took the time to carefully dispose of Zachary's body and the boy's bicycle in a remote location. Thereafter, Stevens realized that he had left the bag tied around Zachary's head and that police could link it to the other bags in Stevens's home, so Stevens went back to the body, got the bag, and threw it away on a road where police later recovered it. All of this fulfilled Stevens's promise to his cellmate made nearly two months earlier that he would kill the next victim he molested to avoid getting caught. App. 227a-236a.

In light of Stevens's confessed actions before, during, and after the murder, it is difficult to see how a jury would view Stevens's current mental

health theories as anything other than a convenient excuse. More to the point, however, the state courts were not objectively unreasonable in believing so.

Additionally, Stevens's own post-conviction experts provided testimony that was far more damaging to Stevens's defense than anything Dr. Lennon said. Dr. Coons agreed that Stevens knew the wrongfulness of his conduct when he tried to cover up the murder. App. 155a, 193a. Both Dr. Coons and Dr. Kaplan, experts who are frequently employed by capital defendants in Indiana, revealed additional, highly prejudicial facts that would have completely undermined Stevens's penalty-phase argument that Zachary was a willing participant in the molestation. The doctors testified that Stevens forcibly molested Zachary against the boy's will, a fact that the jury was unaware of. To say the least, had the jury known the molestation was forcible, it is unlikely to have treated Stevens more leniently. Judge Manion appropriately pointed to this evidence as further support for the reasonableness of the state courts' findings of no prejudice in this case. App. 45a-46a.

To the court of appeals, however, it was beside the point that the mental health evidence Stevens proffered on collateral review was not persuasively mitigating in light of the objective facts because "[a]s a legal matter" the evidence was relevant. App. 24a-25a. But the *relevance* of Dr. Coons's and Dr. Kaplan's opinions is not at issue. The likely impact of their opinions on a jury is. *Strickland*, 466 U.S. at 694 ("[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

In sum, the state courts were required under *Strickland* to assess the relative credibility of Stevens's new mental health evidence and its probable effect in light of the evidence as a whole. They did this, and did it reasonably, but the Seventh Circuit substituted its own view of the situation to justify vacating Stevens's death sentence.

Under no circumstances can a state court's straightforward and honest application of this Court's precedents form the basis for habeas relief under section 2254(d). The Court should grant the petition and reverse the judgment of the court of appeals to the contrary.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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